

Filed 11/21/19 P. v. Gray CA2/8
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

TREVAIL GRAY,

Defendant and Appellant.

B282321

(Los Angeles County
Super. Ct. No. KA106735)

APPEAL from a judgment of the Superior Court Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part, reversed in part, and remanded with directions.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Michael Katz, and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Trevail Gray was convicted by a jury of three counts of attempted murder (Pen. Code,¹ §§ 187, 664), three counts of assault with a firearm (§ 245, subd. (a)(2)), two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), one count of being a felon in possession of ammunition (§ 30305, subd. (a)(1)), and one count of resisting an executive officer (§ 69). The jury found true the allegations that the attempted murders were willful, deliberate and premeditated and that they were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury also found true various allegations that a principal used and discharged a firearm in the commission of the attempted murders (§ 12022.53, subds. (b), (c), (d) & (e)(1)). Defendant admitted he had suffered a prior serious strike conviction and had served a prior prison term. (§§ 667, subds. (a), (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d).) The trial court sentenced defendant to a total term of 147 years to life in prison.

Defendant appealed. In an opinion filed October 1, 2018, we ordered stricken the gang enhancements and remanded to permit the trial court to consider whether to exercise its newly acquired discretion to strike the section 12022.53 firearm enhancements. We otherwise affirmed the judgment.

Defendant petitioned our Supreme Court for review. On September 11, 2019, the Supreme Court transferred the matter back to our court with directions to vacate our decision and reconsider the cause in light of Senate Bill No. 1437 (2017-2018 Reg. Sess.), which changed the law on what mental state is

¹ Further undesignated statutory references are to the Penal Code.

required to be guilty of murder. (Stats. 2018, ch. 1015, §§ 2-4.) Defendant and respondent filed supplemental briefing. Defendant contends we must reverse the judgment of conviction of the three counts of attempted murder. Respondent contends Edwards cannot avail himself of the benefits of Senate Bill No. 1437 on direct appeal and the statute does not apply to attempted murder. We agree with respondent.

“On September 30, 2018, while [the] defendant’s appeal was pending, the Governor signed Senate Bill No. 1437. The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending Penal Code sections 188 and 189, as well as by adding . . . section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2-4.)” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*), review den. May 1, 2019, S254288.)

Martinez held defendants must seek retroactive relief under Senate Bill No. 1437 by way of the statutorily specified procedure, which requires that defendants file a petition with the sentencing court as provided in section 1170.95. The court in *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153 followed *Martinez*. The courts in *People v. Munoz* (2019) 39 Cal.App.5th 738, 754-755 and *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104-1105 followed *Martinez*, and also held Senate Bill No. 1437 does not apply to attempted murder convictions. Except for our agreement with these courts’ careful and correct analysis, we have nothing to add. We find Senate Bill No. 1437 does not apply to a conviction of attempted murder.

Since the Supreme Court vacated our entire opinion, we address below all the issues raised in defendant's appeal. Our analysis and disposition of defendant's claims of error remain the same as in our original opinion.

BACKGROUND

The convictions in this case arose from an October 25, 2013 shooting at a liquor store in Pomona. The incident was captured from various angles by a number of surveillance cameras around the liquor store. Videotape of the incident was shown to the jury at trial. We have reviewed key portions of the videos as well.

The videotape shows a man, later identified as defendant's uncle James Gray (Blue) at the liquor store at about 10:30 p.m. In the store's parking lot, Blue interacted with a man later identified as Raymond Sears, including hugging him. Blue then went inside the liquor store, came back out and left. Blue returned to the store about seven to eight minutes later driving a pickup truck. A man wearing a blue plaid shirt, later identified as defendant, got out of the truck, followed by a man in a white shirt.

Defendant and his companion walked along the front of the liquor store toward the entrance. As they passed by the entrance, the man in the white shirt fired a number of bullets at Sears's truck. The gun was very close to defendant's head when the man fired it, and defendant ducked away from the gun and went into the liquor store. Defendant reappeared briefly at the store's door, pointed a gun out the store door and then returned inside the store.

Sears and two companions were in the front seat of his truck when the man in the white shirt opened fire. Although injured, Sears was able to flee on foot with his two companions, later identified as Ronald Bailey and Steven Goines.

Pomona Police Department officers came to the scene. Sergeant Scott Hess spoke with the liquor store's owner, Saung Lee. The sergeant watched several surveillance videos with Lee in the manager's office. The man in the blue shirt looked familiar to Sergeant Hess, and he later realized that he had participated in a traffic stop of the man. Sergeant Hess later identified the man in the video as defendant.

Lee told Sergeant Hess the man in the blue shirt, defendant, was a frequent customer. Lee stated defendant was standing next to the man in the white shirt when the man in the white shirt began firing a gun. Lee later found defendant "wandering around" inside the liquor store, holding a handgun. Lee directed him out the back door of the store to avoid further trouble.

Other officers went to a 7-Eleven convenience store near the liquor store. Officer Robert Scheppmann found Sears there with head and hand wounds. There was a blood trail at the entrance to the convenience store and Officer Scheppmann eventually followed the trail to the parking lot of the liquor store. Detective Andrew Bebon also went to the 7-Eleven where he saw the injured Sears. Sears was unable to speak. Sears was transported via helicopter to Los Angeles County+USC Medical Center. There is no evidence the police were able to speak with Sears at the hospital. Sears survived and was able to leave the hospital. Detective Bebon spoke to Sears once or twice on the phone about victim's services, but was unable to locate him thereafter.

Officer Richard Aguiar showed photos taken from the surveillance videos to people living nearby. Jerry Orsborn and Linda Nelson identified defendant in the photos, although they

recanted their identification at trial. Officer Aguiar had seen defendant before and recognized him in the photo.

Detective Bebon attempted to locate defendant after the shooting, but could not. In July 2014, he obtained an arrest warrant for defendant. This led to defendant's arrest.

Detective Bebon eventually learned the identity of the two other men with Sears during the shooting. He did not locate the men until two years later, when he learned both were in prison in Nevada.

Detective Bebon and his partner Detective Catanese travelled to Nevada and interviewed Bailey and Goines in their separate prisons. The interviews were recorded.

At trial, Goines and Bailey were uncooperative witnesses. Bailey did admit he was a member of the 456 Island Piru Bloods, a Pomona gang, and that Goines was an associate of the gang. Bailey also testified that the liquor store was in a Blood neighborhood. Bailey acknowledged he had identified defendant from a group of photos and in a video of the liquor store shooting, both of which Detective Bebon showed him in prison. Bailey testified that someone said "cuz" before or during the shooting but not "Budlong." Generally, Bailey and Goines equivocated and claimed not to remember details of the shooting incident or their discussions of the incident with Detective Bebon.

Detective Bebon then testified about portions of the interviews, accompanied at times by the playing of the recordings of the interviews. Detective Bebon testified he showed a photograph to Goines, and Goines pointed to a person in the photo, elsewhere identified as defendant, and said the person was the one saying "cuz." Goines also stated he saw the person with a gun. Detective Bebon also testified he showed the same photo to

Bailey, who identified the man in the blue shirt as “Sticks,” that is, as defendant. Detective Bebon also testified that Bailey stated he heard either Sticks or the man in the white shirt say “Budlong.”

Detective Bebon additionally testified about a December interview he had with Bailey in Pomona. Bailey told him that before the shooting, Bailey was “Blooding,” that is, speaking to Goines in the parking lot using Blood gang slang. The detective also noted Bailey admitted his membership in the 456 Island Piru Bloods. Goines was an associate of the gang.

A redacted version of the recordings of each of the three interviews was admitted into evidence, along with the redacted transcripts. A more detailed summary of the men’s Nevada interview statements is provided in part I, *post*, discussing defendant’s new trial motion.

Los Angeles County Sheriff’s Deputy Joshua Whiting testified for the prosecution as a gang expert on the 10 Deuce Budlong Gangster Crips. He opined that defendant was a member of that gang.² Deputy Whiting also testified that Crips and Bloods are generally enemies. In response to a hypothetical based on the facts of this case, Deputy Whiting opined the crimes were committed for the benefit of the Budlong Gangster Crips.

In his trial testimony, Detective Bebon provided more evidence on the background of the 456 Island Piru Bloods gang. He testified that the liquor store where the shooting took place

² Deputy Whiting’s opinion was based in part on defendant’s admission in a 2013 field interview that he was a Budlong Gangster Crip. Pomona Police Department Detective Greg Freeman conducted the 2013 interview during a traffic stop and testified about defendant’s admission at trial.

was located at the edge of that gang's territory. The detective testified the 456 Island Piru Bloods gang had been in a rivalry with several Crips gangs for a long time. Detective Bebon also opined the shootings were committed for the benefit of the Budlong Gangster Crips.

Defendant testified in his own defense at trial. He stated he did not know the man in the white shirt who rode with him to the liquor store in Blue's truck. At the liquor store, defendant got out of the truck and started walking toward Sears to say hello. The unknown man walked with him. Defendant did not know the man had a gun. When defendant heard shots, he was scared, thought the shooter was firing at him and tried to escape.

Inside the liquor store, defendant took out a gun which he carried for self-protection. He pointed the gun out the store's door but did not shoot. Defendant went back inside the store and eventually left through a back entrance with two women. He did not know Bailey or Goines, and did not shoot at anybody.

DISCUSSION

I. Motion for New Trial

Defendant moved for a new trial on (1) the statutory ground of newly discovered evidence, (2) the denial of a fair trial due to the presentation of perjured testimony, and (3) a violation of the *Brady*³ duty to disclose exculpatory evidence. All three claims were based on declarations submitted by Bailey and Goines after trial, in which the men asserted Detective Bebon had pressured them into providing false statements during a recorded interview. The declarations implied that the pressure occurred prior to the recording beginning. The detective

³ *Brady v. Maryland* (1963) 373 U.S. 83.

submitted a declaration denying any unrecorded discussions with the men. The trial court denied the new trial motion.

Defendant contends the trial court's "erroneous legal conclusions" that Bailey and Goines were "bit players" in the trial contravened the record and United States Supreme Court precedent. Defendant claims the men were "crucial" to the prosecution's case and their testimony supported the motive and intent for the offenses and for the gang enhancement. Defendant asserts the "[e]xculpatory and impeaching evidence" in the men's posttrial declarations put the case in a different light, undermined confidence in the outcome and requires reversal. In his reply brief, defendant claims the trial court's explanation of its ruling constituted an "express and/or implied factual finding that the posttrial declarations were credible" and that this finding binds this court.

A. Background

On February 25, 2017, about a month after the jury reached its verdicts in this matter, Bailey and Goines executed declarations recanting portions of their recorded pretrial prison interview statements to Detective Bebon. These pretrial statements had been used at trial to impeach Bailey and Goines, who were reluctant witnesses.

Goines's posttrial declaration states that at the beginning of his pretrial prison interview with Detective Bebon, the detective said the interview was not being recorded. Detective Bebon then showed Goines a photographic lineup, pointed to one of the photos and said it was "Sticks," and Sticks was the person who shot at Goines. Goines did not know who Sticks was. Detective Bebon then asked "questions, such as, 'He said the word cuz, didn't he?'" Goines replied that he did not. Detective

Bebon asked Goines “to agree with what he (Bebon) was saying. Det[ective] Bebon said, ‘Sticks said, “yeah, cuz.”’ [¶] Det[ective] Bebon told [Goines], ‘I will put you in [a] gang file if you don’t corroborate what I was saying.’” The interview was in fact recorded. The statements attributed to Detective Bebon do not appear anywhere in the recording of the detective’s interview with Goines, and Goines does not offer a theory to explain their absence from the recorded interview.

Bailey’s posttrial declaration states that at the beginning of his pretrial prison interview, Detective Bebon asked him if he “remember[ed] something that happened at a liquor store in Pomona when [Bailey] got shot at?” Bailey “indicated yes.” Detective Bebon asked Bailey if he would be willing to testify about it and Bailey “told him no because I don’t really remember any of it.” Detective Bebon then showed Bailey a photo and told him it was “Sticks.” Before seeing the photo, Bailey “did not know what Sticks looked like.” According to Bailey, “Det[ective] Bebon then began to use leading questions to give facts about what occurred. He showed another picture and said, ‘Didn’t [S]ticks get out of the car first and said “Budlong Cuz?”’ I told him (Bebon) that I thought I heard the word ‘cuz’ but not ‘Budlong,’ and I don’t know who said it. I didn’t see who got out first because I was ducking.” Bailey stated that “[a]bout halfway through the interview, Det[ective] Bebon reintroduced himself again. He re-showed the photographs again [*sic*], and re-asked most of the questions he already asked.” The statements attributed to Detective Bebon do not appear anywhere in the recording of the detective’s pretrial prison interview with Bailey. Bailey’s reference in his posttrial declaration to the detective “re-asking” questions during the pretrial prison interview implies

that either the first part of his pretrial prison interview with Detective Bebon was not recorded, or that the recording produced by the detective was not complete.

In opposition to defendant's motion, the prosecution submitted a posttrial declaration from Detective Bebon that states: "The entire conversation that I had with both Steven Goines and Ronald Bailey was audio taped. Those recordings were provided as part of the discovery process." The detective also stated: "I did not talk to either Goines or Bailey on July 19, 2016 off-tape. The recording is the entirety of my interaction with both witnesses on that date. The recordings were started prior to each separate inmate being brought into each individual interview room."

The trial court denied the new trial motion without expressly ruling on the credibility of Bailey's and Goines's posttrial declarations. The court explained that "the primary witness in this particular case was the cameras and the video system. Everybody else was basically a supporting character." The court pointed out that Bailey's trial testimony was in fact consistent with his posttrial declaration: Bailey testified at trial that he only heard the word "cuz" and not the word "Budlong." The court also pointed out that defendant was identified from the video stills by other witnesses in addition to Bailey and Goines. The court concluded: "Taking all of this material, as well as the balance of the information, I don't find that we have anything material to add to the information that was presented to the jury. Cross examination for all the witnesses was extensive. I think it's all cumulative, to be honest with you. As to the statements from the two folks from Nevada, they were at best bit players. The case could have been proved beyond a reasonable doubt . . .

without them even appearing. They appear on the disks that were presented from the video in the store.”

B. Standard of review

Defendant’s motion for new trial included two claims which, if true, would show violations of his federal constitutional rights: (1) the presentation of perjured testimony, and (2) a *Brady* violation.

A trial court’s ruling on a motion for a new trial is reviewed under a deferential abuse of discretion standard. (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) Thus, we will not disturb the trial court’s ruling unless defendant establishes “‘a manifest and unmistakable abuse of discretion.’” (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) This standard of review applies even when, as here, the defendant asserts violations of federal constitutional rights. (*Hoyos, supra*, at p. 917, fn. 27.) In such circumstances, the defendant’s abuse of discretion claim is best understood as the asserted failure of the trial court to recognize violations of defendant’s constitutional rights. (*Ibid.*) Our abuse of discretion analysis must therefore also address the constitutional aspects of the motion under the appropriate standard for those claims. (*Id.* at pp. 917-922 [performing a traditional *Brady* analysis].)

C. Brady claim

In the new trial motion, defendant describes the evidence he claims to have been suppressed as undisclosed (and apparently unrecorded) discussions between Detective Bebon and Bailey and Goines which immediately preceded the recorded pretrial prison interviews with Bailey and Goines (which had been disclosed to the defense). The motion states that during those earlier pretrial prison discussions, Detective Bebon

provided the men with “information and direction which resulted in their testimony at trial.”

The elements of a *Brady* claim involve “[c]onclusions of law or of mixed questions of law and fact, . . . [citation] [and] are subject to independent review.” (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*)). Findings of fact by the trial court “though not binding, are entitled to great weight when supported by substantial evidence. [Citation.]” (*Ibid.*)

“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.’ (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282, fn. omitted.) Prejudice, in this context, focuses on ‘the materiality of the evidence to the issue of guilt or innocence.’ (*United States v. Agurs* [(1976)] 427 U.S. [97,] 112, fn. 20; accord, *U.S. v. Fallon* (7th Cir. 2003) 348 F.3d 248, 252.) Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible (cf. *Wood v. Bartholomew* (1995) 516 U.S. 1, 2), that the absence of the suppressed evidence made conviction ‘more likely’ (*Strickler, supra*, . . . at p. 289), or that using the suppressed evidence to discredit a witness’s testimony ‘might have changed the outcome of the trial’ (*ibid.*). A defendant instead ‘must show a “reasonable probability of a different result.”’ (*Banks v. Dretke* (2004) 540 U.S. 668, 699.)” (*Salazar, supra*, 35 Cal.4th at p. 1043.)

“‘In general, impeachment evidence has been found to be material where the witness at issue “supplied the only evidence linking the defendant(s) to the crime,” [citations], or where the

likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citation]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony" [citations].⁷ [Citation.]” (*Salazar, supra*, 35 Cal.4th at p. 1050.)

1. Suppressed evidence

Although the defense motion characterized the allegedly suppressed unrecorded pretrial discussions as influencing the men's trial testimony, the posttrial declarations themselves, as set forth in detail above, refer to Detective Bebon's influence on the men's pretrial prison interview statements. The men specifically identified two areas where they lied in their pretrial prison statements: (1) their identification of defendant as one of the men who got out of the pickup truck at the liquor store; and (2) their statements that defendant and/or the shooter said "cuz" and/or "Budlong" prior to or during the shooting. At trial, the men claimed not to remember some of their pretrial prison statements and denied others were true. Thus, the allegedly suppressed evidence would have been relevant to impeach some of the men's trial testimony and some of their pretrial prison interview statements, which were introduced at trial through the testimony of Detective Bebon.

2. Identification statements and testimony

Very early in his trial testimony, when questioned directly about events leading up to the shooting, Bailey stated all he saw on the night of the shooting was the pickup truck pull up in the liquor store parking lot. The prosecutor then shifted to asking Bailey about his pretrial statements to Detective Bebon. Bailey acknowledged he had identified Sticks from a group of photos which the detective showed him. Bailey also agreed he pointed

out a person who appeared to be Sticks in a video from the liquor store shooting. Bailey claimed, however, not to recall telling the detectives he saw Sticks get out of the pickup truck driven by Blue. Bailey claimed he ducked when the car pulled up and did not see who got out of the pickup truck.

Bailey was ultimately impeached during trial with his recorded statements to Detective Bebon. In that interview, Bailey said Sticks got out of the pickup truck at the liquor store with another man. Bailey also said the man in the white shirt raised a gun as he and Sticks were walking around the pickup truck.

In his posttrial declaration, Bailey recanted his identification of the person in the photos/video as “Sticks.” He stated he did not know what “Sticks” looked like before Detective Bebon showed him a photo during the prison interview.

Goines, too, indicated early in his testimony that he did not remember the events that led up to the shooting. The prosecutor asked Goines about his statements to Detective Bebon; Goines testified he did not remember telling Detective Bebon he had seen two men get out of the pickup truck. He testified he had his head down and did not see anything. Goines also denied Bailey told him the shooter was Sticks. Goines testified he could not remember if he told Detective Bebon that Bailey said Sticks was the shooter.

Goines was ultimately impeached during trial with his recorded pretrial interview statements to Detective Bebon. In that interview, Goines had told the detective that one of the men who got out of the pickup truck went by the name of Sticks. However, when shown a group of photos, Goines said, “I don’t know which one Sticks is.” Detective Bebon asked Goines how he

heard that the man might be called Sticks. Goines responded that Bailey told him after the shooting that Sticks was the person who shot at them.

In his posttrial declaration, Goines recanted his pretrial prison statements indicating that Sticks was involved in the shooting. Goines now declared he did not know who Sticks was before Detective Bebon showed him a photo lineup during the prison interview.

The trial court found that defendant had been identified by other witnesses, as well as being seen in the video of the shooting. Our independent review of the record confirms these findings are supported by substantial evidence: Defendant's identity and presence were corroborated by videos of the shooting and the testimony of Orsborn, Nelson, Officer Aguiar and Sergeant Hess. A new trial is generally not required where the allegedly suppressed evidence related to witness testimony that was otherwise corroborated. (*Salazar, supra*, 35 Cal.4th at p. 1050.)⁴

3. Statements and testimony about “cuz” and/or “Budlong”

Goines testified at trial that he only heard gunshots, and he did not remember telling Detective Bebon in the pretrial prison interview that he had heard someone say “cuz.”

Goines was ultimately impeached at trial with his recorded pretrial prison interview statements to Detective Bebon. In that

⁴ Stated in terms of materiality, impeachment evidence is material “‘where the witness at issue “supplied the only evidence linking the defendant(s) to the crime.” ’” (*Salazar, supra*, 35 Cal.4th at p. 1050.)

interview, Goines told the detective that one of the men who got out of the pickup truck said “Yeah, cuz” repeatedly.

In his posttrial declaration, Goines stated that Sticks did not say “cuz” and he told Detective Bebon this in the pretrial prison interview. Goines stated in his declaration that the detective pressured him to agree that Sticks did say “cuz,” and Goines bowed to that pressure.

Bailey testified at trial that all he heard was the word “cuz.” He did not tell Detective Bebon during the pretrial prison interview that he heard “Budlong.” When informed that Detective Bebon had recorded the pretrial prison interview, Bailey stood by his claim that he heard the word “cuz” but not the word “Budlong.”

Bailey was ultimately impeached at trial with his recorded pretrial prison interview statements to Detective Bebon. In that interview, Bailey told the detective that one of the men said, “Budlong,” but Bailey was not sure which one.

In his posttrial declaration, Bailey stated that during the pretrial prison interview, Detective Bebon asked Bailey if Sticks said “Budlong Cuz” but Bailey replied that he only heard “cuz,” and he did not know which of the men said it.

The use of the words “cuz” and “Budlong” were relevant primarily to the gang enhancement allegation. Significantly, Deputy Whiting, the prosecution’s primary gang expert, was asked about the importance of these words to his opinion that the crimes were committed for the benefit of the Budlong Crips. On cross-examination, defense counsel asked Deputy Whiting if it would change his opinion if “no one heard anything being yelled? For example, the factor would be removed of yelling of ‘cuz’ or

‘Budlong.’ Would that change your [opinion]?” Deputy Whiting replied, “No.”

Thus, even if the likely impact of the suppressed evidence would have been to undermine Goines’s and Bailey’s statements and testimony about “cuz” and “Budlong,” those statements and testimony were not needed to support a critical element of the prosecution’s case. Thus, the “cuz/Budlong” impeachment evidence does not meet the *Brady* standard of materiality. (See *Salazar, supra*, 35 Cal.4th at p. 1050 [impeachment evidence is material if “ ‘the likely impact on the witness’s credibility would have undermined a critical element of the prosecution’s case’ ”].)

4. Overall credibility

Considering the impact of Bailey’s and Goines’s posttrial declarations on the men’s overall credibility, that impact would have been slight to nonexistent.⁵ Both men had otherwise shown themselves to be less than honest and forthcoming. Goines, for example, stated in his prison interview that he “grew up in Perris and Moreno Valley” and “had barely started coming to Pomona only, like, two or three months” before the shooting. These statements were made to support his claim he was not a 456 Island Piru Bloods gang member and was only loosely connected to that gang as an associate. At trial, however, Goines testified he grew up in Pomona and had lived in Perris “at some point.” While the trial was ongoing, Bailey was revealed to have lied in his trial testimony when he denied making his pretrial “Budlong” statement to Detective Bebon; further, Bailey effectively claimed

⁵ Defendant did not argue in the trial court that a new trial was warranted on the ground that Bailey’s and Goines’s declarations impeached Detective Bebon’s credibility.

in his trial testimony that his recorded pretrial statement to Detective Bebon on this topic was a lie. Both Bailey and Goines had convictions for crimes of moral turpitude, affecting their credibility. Both men were very evasive in answering even minor unimportant questions at trial, responding with equivocal answers, claims of lack of recollection, or both.⁶

5. Prejudice

Prejudice is, in effect, assessed through the materiality prong of a *Brady* claim. Suppressed “evidence is material ‘only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ ‘A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Hoyos, supra*, 41 Cal.4th at pp. 917-918.) The defendant has the burden of showing materiality. (*Id.* at p. 918.)

For the reasons set forth above, we see no reasonable probability of a different outcome at trial if the contents of the posttrial declarations had been disclosed to the defense before trial. The evidence was not material, and so there was no *Brady* violation. The trial court did not abuse its discretion in disagreeing with the defense that a *Brady* violation had occurred.

⁶ For example, when the prosecutor asked Bailey what kind of car he had seen Blue near in the parking lot, Bailey replied, “I don’t remember.” When the prosecutor specifically asked defendant if he had told Detective Bebon that he saw Blue get into a Mercedes, Bailey responded, “I mean, I think it was a Mercedes . . . I don’t know.” The make of the car was of little to no importance.

D. Newly discovered evidence

In ruling on a motion for new trial based on the ground of newly discovered evidence, the trial court similarly considers whether the evidence is “ “ ‘such as to render a different result probable on a retrial of the cause.’ ” ” (*People v. Howard* (2010) 51 Cal.4th 15, 43.) The court also considers whether the new evidence is material and not cumulative. (*Ibid.*)⁷ Here, the trial court ruled that the declarations did not add anything “material” to the information that was presented to the jury, and the evidence offered in support of the motion for new trial was “cumulative.” This is an implied finding that it was not reasonably probable the new evidence would result in a different outcome. As our discussion above shows, there is substantial evidence to support the trial court’s findings on the nature of the newly proffered evidence. Further, we have concluded in our *Brady* analysis that the new evidence did not render a different result reasonably probable. Thus, the trial court did not abuse its discretion in denying the new trial motion made on statutory grounds.

⁷ A trial court considers five factors in total: “ “ ‘1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.’ ” [Citations.] [Citation.]” (*People v. Howard, supra*, 51 Cal.4th at p. 43.) As factors 1, 4 and 5 were not disputed in the trial court, we do not consider them on appeal.

E. False testimony

“When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required if there is *any reasonable likelihood* the false testimony could have affected the judgment of the jury. This standard is functionally equivalent to the ‘harmless beyond a reasonable doubt’ standard of *Chapman v. California* (1967) 386 U.S. 18. (*In re Jackson* (1992) 3 Cal.4th 578, 597-598)” (*People v. Dickey* (2005) 35 Cal.4th 884, 909.)⁸

Defendant contends the court’s statement “it’s all cumulative, to be honest with you” is an implied finding that

⁸ “The United States Supreme Court has held that the state’s duty to correct false or misleading testimony by prosecution witnesses applies to testimony which the prosecution knows, or *should know*, is false or misleading (see *United States v. Agurs, supra*, 427 U.S. at p. 103 . . .), and has concluded this obligation applies to testimony whose false or misleading character would be evident in light of information known to other prosecutors, to the police, or to other investigative agencies involved in the criminal prosecution. (See, e.g., *Giglio v. United States* [(1972)] 405 U.S. 150, 154 [information known to prior prosecutor]; *United States v. Bagley* [(1985)] 473 U.S. 667, 670-672 & fn. 4 [information known to federal investigators]; *Barbee v. Warden, Maryland Penitentiary* (4th Cir. 1964) 331 F.2d 842, 846 [information known to investigating police officers]. See also Comment, *The Prosecutor’s Duty [to] Disclose: From Brady to Agurs and Beyond* (1978) 69 J.Crim.L. & Criminology 197, 205-206; 2 LaFave & Israel, *Criminal Procedure* (1984) § 19.5, pp. 553-554 & fn. 9.)” (*In re Jackson, supra*, 3 Cal.4th at pp. 595-596, disapproved on another ground by *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

Bailey's and Goines's declarations were credible. Defendant further contends this court is bound by those findings. While we do not agree, we will assume for the purpose of considering defendant's argument that Bailey's and Goines's claims in their declarations that they did not know and/or recognize defendant were true, and Bailey's testimony to the contrary at trial was false. We will also assume for this purpose that the introduction into evidence at the trial of the men's statements to Detective Bebon asserting that defendant or his companion used the words "cuz" and/or "Budlong" constituted the presentation of false testimony.

We independently review the record (see *Napue v. Illinois* (1959) 360 U.S. 264, 272) and see no "reasonable likelihood [that] the false testimony could have affected the judgment of the jury." (*People v. Dickey, supra*, 35 Cal.4th at p. 909, italics omitted.) As we explained in our discussion of defendant's *Brady* claim, other witnesses identified defendant as the man in the blue plaid shirt in the video. Deputy Whiting's opinion was not dependent on defendant or the shooter having said either "cuz" or "Budlong." There was ample evidence from other witnesses to support the true finding on the gang enhancement. Overall, the credibility of Bailey and Goines was significantly impeached during trial. Thus, any admission of false testimony was harmless beyond a reasonable doubt. (See *People v. Dickey*, at p. 909.)

2. Aiding and Abetting Instruction

Defendant contends the trial court committed two errors in instructing the jury on general principles of aiding and abetting using a modified version of CALJIC No. 3.01: (1) leaving in the phrase "by failing to act in a situation where a person has a legal duty to act" even though defendant had no duty to act and

(2) omitting the word “and” between two clauses in the last paragraph. He claims these errors violated both state and federal constitutional law and were not harmless.

The People contend that the “instruction [was] correct in law and responsive to the evidence” and so defendant has forfeited his claim that the instruction was “too general or incomplete” by failing to request clarifying or amplifying instructions during trial proceedings. (See *People v. Johnson* (2016) 62 Cal.4th 600, 638.) Defendant’s first claim is that the reference to a legal duty to act was not responsive to any evidence in the case; that claim is not forfeited. His second claim is that the instruction is incomplete without the use of the word “and.” Although that claim is otherwise forfeited, we review it pursuant to section 1259, which permits review of an instruction given by the trial court even though it was not objected to if the substantial rights of the defendant were affected thereby. “Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.” (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

A. Extraneous “duty to act” language

The first error appears in context as follows: “A person aids and abets the commission or attempted commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice, *or, by failing to act in a situation where a person has a legal duty to act*, aids, promotes,

encourages or instigates the commission of the crime.” (Italics added.) Defendant contends and the People agree that defendant had no legal duty to act.

“Giving an instruction that is correct as to the law but irrelevant or inapplicable is error. [Citation.] Nonetheless, giving an irrelevant or inapplicable instruction is generally ‘only a technical error which does not constitute ground for reversal.’” [Citation.]” (*People v. Cross* (2008) 45 Cal.4th 58, 67.)

Such an error violates California law, but does not implicate the United States Constitution. The error is reviewed under the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People v. Debose* (2014) 59 Cal.4th 177, 205-206.) In most cases, an error of this sort is harmless. (*People v. Rowland* (1992) 4 Cal.4th 238, 282.)

This is such a case. The language refers to “a situation where a person has a legal duty to act” but the trial court did not instruct the jury that this case presented such a situation. The prosecutor never argued or implied that defendant had a duty to act to prevent the shootings. The prosecutor’s theory of the case was that defendant was either directly involved in the crimes or was liable under the natural and probable consequences doctrine. The jury was instructed pursuant to CALJIC No. 17.31 that all instructions are not necessarily applicable. The jury must be considered to have understood and dismissed the reference to a legal duty to act as mere surplusage. (See *People v. Rowland*, *supra*, 4 Cal.4th at p. 282.)

B. Omission of the word “and”

The second claimed error appears in the written version of the instruction as follows: “Mere knowledge that a crime is being committed [text redacted] the failure to prevent it does not

amount to aiding and abetting.” The word “and” follows “committed” in the standard version of this instruction. The trial court’s reading of the instruction to the jury is transcribed as “Mere knowledge that a crime is being committed, the failure to prevent it does not amount to aiding and abetting.”

Defendant contends the court’s omission “mistakenly constricted and obliterated two distinct prongs excluding aiding and abetting liability.” The omission of the word “and” does interject some ambiguity into this portion of the instruction.

“In reviewing an ambiguous instruction, we inquire whether there is a reasonable likelihood that the jury misunderstood or misapplied the instruction in a manner that violates the Constitution. (*Estelle [v. McGuire]* (1991) 502 U.S. [62,] 72.)” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 906.)

Here, it is obvious that something is missing from the sentence which comprises the last paragraph of the instruction. This is particularly clear from the written instruction, reproduced above. Simply as a matter of grammar and logic, a connecting word is missing from the sentence. “We ‘credit jurors with intelligence and common sense.’” (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) Rational jurors would mentally insert the words “and” or “or” into the gap. Either choice is favorable to defendant. There is no reasonable possibility that defendant was deprived of a defense to aiding and abetting liability by the manner in which this instruction was presented to them.

III. Natural and Probable Consequences Instruction

Defendant contends the trial court erred prejudicially in misidentifying the nontarget offense for the natural and probable consequences doctrine as assault with a deadly weapon, the same crime listed as the target offense. He claims the error permitted

the jury to convict him of attempted murder without finding that his co-principal had the specific intent to kill required for a conviction of attempted murder. The People acknowledge the trial court misstated the nontarget offense, but contend the misstatement was harmless error.

A. Instruction given

The trial court instructed the jury with CALJIC No. 3.02. The first two paragraphs of this instruction read:

“One who aids and abets another in the commission of a crime or crimes is not only guilty of . . . those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.

“In order to find the defendant guilty of the crimes of [attempted murder, sections 187 and 664], under this theory, as charged in [c]ounts 1, 2, [and] 3, you must be satisfied beyond a reasonable doubt that: [¶] 1. *The crime or crimes of [section 245, subdivision (a)(2)] were committed;* [¶] 2. That the defendant aided and abetted that those [*sic*] crimes; [¶] 3. *That a co-principal in that crime committed the crimes of [section 245, subdivision (a)(2)];* and [¶] 4. The crimes of [sections 187 and 664] was were [*sic*] a natural and probable consequence of the commission of the crimes of [section 245, subdivision (a)(2)].” (Italics added.)

The last paragraph of the instruction told the jury: “You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of

[sections 187 and 664] was a natural and probable consequence of the commission of that target crime.”

B. Analysis and law

The CALJIC No. 3.02 instruction correctly states the legal requirements for liability under the natural and probable consequences doctrine. The error here involves a mistake of fact, that is, the designation of the crime which under the circumstances of this case was the nontarget offense. While this error may have created some ambiguity in the instruction, we see no reasonable likelihood that the jury applied this instruction in a way that violates the Constitution. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 906; *People v. Prettyman* (1996) 14 Cal.4th 248, 272, superseded by statute, as stated in *People v. Lopez*, *supra*, 38 Cal.App.5th at p. 1103.)

The prosecutor identified the alleged target and nontarget offenses in the opening statement and explained that the nontarget crime was attempted murder: “[T]he co-perpetrator, the guy in the white shirt, attempts to kill [and] that guy firing the gun was a natural and probable consequence of the original intent of . . . defendant . . . to do an assault.”

The first paragraph of CALJIC No. 3.02 told the jury that liability under the natural and probable consequences doctrine applied when a defendant aided and abetted the commission of a crime and “any *other* crime [was] committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.” (Italics added.) Thus, the jury knew the instruction only applied when two different crimes were committed, and also knew that both crimes had to be committed

by the principal.⁹ When faced with the repetition of the same crime, assault, in subsections 1 and 3, a rational juror would recognize as a matter of logic that the repetition of assault was a mistake of fact.

The instruction as a whole told the jury that attempted murder was in fact the “other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.” Subsection 4 tells the jury it must find that attempted murder “was a natural and probable consequence of the commission of the crimes of [assault].” The last sentence of the instruction also tells the jury it must agree that “the crime of [attempted murder] was a natural and probable consequence of the commission of [the] target crime.”

A rational jury would understand that the instruction required the jury to find that a co-principal committed attempted murder. The jury was correctly instructed on the elements of attempted murder and premeditated attempted murder necessary to convict a defendant of those crimes, including the requisite intent. There is no reasonable likelihood that the jury understood the instruction to permit it to convict defendant of attempted murder without finding that a principal actually committed attempted murder, and did so with the necessary element of intent. To use defendant’s formulation of the *Chapman*¹⁰ standard of review, the error did not contribute to

⁹ The jury was instructed with CALJIC No. 3.00 that persons involved in committing a crime may be divided into two categories: (1) those who directly and actively commit the crime, and (2) those who aid and abet the commission of the crime.

¹⁰ *Chapman v. California, supra*, 386 U.S. at page 24. The phrase “reasonable likelihood . . . is functionally equivalent to the

the verdict and was harmless beyond a reasonable doubt. (See *People v. Patterson* (1989) 209 Cal.App.3d 610, 615.)

IV. Kill Zone Instruction

The trial court instructed the jury on a kill zone theory of attempted murder using CALJIC No. 8.66.1. The trial court’s reading of the instruction to the jury is transcribed as: “A person who primarily intends to kill one person or persons known as the primary targets may, at the same time, attempt to kill all persons in the immediate vicinity of the primary targets. This area is known as the kill zone. A kill zone is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill *anyone* in the immediate vicinity of the primary targets. If the perpetrator has this specific intent, and employs the means sufficient to kill the primary targets and all others in the kill zone, the perpetrator is guilty of the crimes of attempted murder of the other persons in the kill zone.” (Italics added.)¹¹

‘ “harmless beyond a reasonable doubt” ’ standard of *Chapman*.” (See *People v. Dickey, supra*, 35 Cal.4th at p. 909, italics omitted.)

¹¹ The written version of the instruction reads as follows: “A person who primarily intends to kill one person, or persons, known as the primary targets, may—at the same time—attempt to kill all people persons [*sic*—in the immediate vicinity of the primary targets. This area is known as the ‘kill zone.’ A kill zone is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill anyone everyone in the immediate vicinity of the primary targets. If the perpetrator has this specific intent, and employs the means sufficient to kill the primary targets and all others in the kill zone, the perpetrator is guilty of the crimes of attempted murder of the other persons anyone in the kill zone. [¶] Whether a

Defendant contends the instruction’s use of the term “anyone” misstates the kill zone doctrine, which requires an intent to kill “everyone” in the kill zone, and so permits a conviction for attempted murder without requiring the applicable intent to kill. The People contend the instruction is correct.

Defendant relies on *People v. Perez* (2010) 50 Cal.4th 222, 232, *People v. Smith* (2005) 37 Cal.4th 733, 745-746, *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243, *People v. Cardona* (2016) 246 Cal.App.4th 608, 615, review granted July 27, 2016, S234660,¹² and *People v. McCloud* (2012) 211 Cal.App.4th 788, 798 to show error in the court’s failure to use the word “everyone” in the kill zone instruction. This reliance is misplaced: these cases all involve fact patterns which did not support a kill zone instruction.

Our colleagues in Division Two have found no error in the use of the word “anyone” in the CALCRIM No. 600 instruction on

perpetrator actually intended to kill the victim, either as a primary target or as someone within a ‘kill zone’ zone of risk is an issue to be decided by you.”

¹² Our Supreme Court initially deferred briefing in *Cardona* pending consideration and disposition of a related issue in *People v. Canizales* (S221958, review granted Nov. 19, 2014). The court stated that *People v. Canizales* “presents the following issue: Was the jury properly instructed on the ‘kill zone’ theory of attempted murder?” Ultimately, the Supreme Court transferred *Cardona* back to the Court of Appeal with directions to “vacate its decision and to reconsider the cause in light of Senate Bill 620. . . .” (*People v. Cardona, supra*, 246 Cal.App.4th 608, transferred Sept. 18, 2019, S234660.) The Supreme Court issued its opinion in *People v. Canizales* in June 2019. (*People v. Canizales* (2019) 7 Cal.5th 591.)

the kill zone theory. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1243-1244.) The version of the instruction used in *Campos* explains that “[a] person may intend to kill a specific victim or victims and at the same time intend to kill *anyone* in a particular zone of harm or ‘kill zone.’” (*Id.* at p. 1241.) It states that the People must prove the defendant “intended to kill *anyone* within the kill zone.” (*Ibid.*, italics added.) Finally, the instruction concludes by telling the jury to find the defendant not guilty if it has a reasonable doubt that the defendant intended to kill the identified victim(s) “by harming *everyone* in the kill zone.” (*Ibid.*, italics added.) The court concluded that the instruction as a whole “is consistent with [*People v. Bland* (2002) 28 Cal.4th 313] and directed the jury that it could not find [the defendant] guilty of attempted murder of [the victim] under a ‘kill zone’ theory unless it found that he intended to harm ‘everyone’ in the zone.” (*Id.* at p. 1243.) The court found that in context “there is little difference between the words ‘kill anyone within the kill zone’ and ‘kill everyone within the kill zone.’ In both cases, there exists the specific intent to kill each person in the group.” (*Ibid.*)

Our Supreme Court has reached a similar conclusion and has indicated in dicta that the above-quoted CALCRIM instruction on the kill zone theory which uses the phrase “kill anyone” was probably harmless error. The court explained: “In context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone.” (*People v. Stone* (2009) 46 Cal.4th 131, 138, fn. 3.)

Here, the case for harmless error is even stronger than in *Stone*. The oral version of CALJIC No. 8.66.1 used “anyone” and “all persons”/“others” interchangeably, thus increasing the

likelihood that the jury would understand “anyone” to mean “everyone.” Even applying the *Chapman* standard of review, which defendant asserts is applicable to “error involving the elements of the offense” (see *People v. Falaniko, supra*, 1 Cal.App.5th at p. 1245), we conclude there is no reasonable possibility that the jury in this case misunderstood the phrase “anyone” and convicted defendant without a finding that the shooter had the requisite specific intent to kill each person in the group. (See *People v. Campos, supra*, 156 Cal.App.4th at p. 1243.) The error claimed did not contribute to the verdict and was harmless beyond a reasonable doubt.

V. “Equally Guilty” Phrase in CALJIC No. 3.00

The trial court instructed the jury with an older version of CALJIC No. 3.00, probably from 2012. The trial court’s reading of the instruction to the jury is transcribed as “Each principal, regardless of the extent or manner of participation is equally guilty of a crime.”¹³ As defendant notes, there has been criticism of the “equally guilty” language of this instruction, on the ground that an aider and abettor may be guilty of a lesser or greater offense than the perpetrator. He contends the instruction violated his federal constitutional right to due process as a misinstruction on an element of an offense and as a conclusive and/or burden shifting presumption.

The People contend defendant has forfeited this claim because he did not object that the instruction was too general or

¹³ The written version, which contains an obvious (and harmless) typographical error states “Each principal, regardless of the extent or manner of participation is equally guilty. guilty [sic] of a crime.”

incomplete or ask for clarifying or amplifying language. (See *People v. Johnson, supra*, 62 Cal.4th at p. 638.) At defendant's request, we review his claim pursuant to section 1259.¹⁴

Our Supreme Court has explained that the instruction "generally state[s] a correct rule of law. All principals, including aiders and abettors, are 'equally guilty' in the sense that they are all criminally liable. (See § 31.) The instruction could be misleading if the principals in a particular case might be guilty of different crimes and the jury interprets the instruction to preclude such a finding." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 433.)

There is no possibility the jury was misled in this case, however. The last paragraph of the instruction makes clear that a more specific rule applied for the attempted murder charges. That paragraph reads: "When the crime charged is . . . attempted murder ____, the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person[']s own mental state. If the aider and abettor's mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's, if the aider and abettor has a less culpable mental state."

¹⁴ Because we review defendant's claim and find no prejudice, we need not and do not consider defendant's assertion that if his claim is forfeited, his counsel's failure to object constituted ineffective assistance of counsel.

VI. Prosecutorial Error in Opening and Closing Statements

Defendant contends the prosecutor's use of the phrase "partners in crime" during opening statements was improperly argumentative and his description of Goines as a gang "member" in closing arguments misstated the evidence. Defendant further contends the prosecutor misstated the law on the mental state required for an aider and abettor of willful, deliberate and premeditated attempted murder.

The record establishes that defendant did not object to these three statements. This is the basis for the People's contention that defendant has forfeited his claim by failing to object and request a curative admonition in the trial court. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Avena* (1996) 13 Cal.4th 394, 442.) Defendant acknowledges this rule, but contends he was "excused from the necessity of either a timely objection and/or a request for admonition [because] either would [have been] futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

A. Language-based errors

Assuming for the sake of argument that the phrase "partners in crime" was an implicit argument about the men's mental states in committing the charged crimes, rather than merely a colorful description of the men's relationship, the court could have cured any possible slight prejudice by admonishing the jury that the men's mental state should be determined by the jury after hearing all the evidence and receiving legal instructions from the court. Thus, defendant has forfeited this claim.

Similarly, an admonition easily could have cured any possible slight prejudice from the prosecutor's misstatement that Goines was a gang "member," particularly since the evidence was essentially undisputed that Goines was a gang "associate."¹⁵ If defendant had objected, the trial court could have reminded jurors of the opening instructions that statements made by the attorneys during trial are not evidence and that it was the jury's duty to determine what facts have been proved by the evidence. Even without an objection, the jury was re-instructed on these topics as part of the closing instructions, soon after the closing arguments. Thus, defendant has forfeited this claim as well.

B. Legal error

Defendant contends the prosecutor misstated the law when he argued: "With attempted murder, all that's required for the willful, deliberate, and premeditation is that any principal have that state of mind. So a finding that the guy in the white shirt fired that weapon with the intent to kill and did it willfully and with deliberation and premeditation is sufficient in this case where we have two defendants participating in the crime."

An objection to this statement would have been futile because the prosecutor correctly stated the current law on this topic. (*People v. Favor* (2012) 54 Cal.4th 868, 879-880 (*Favor*).)¹⁶

¹⁵ The gang expert's hypothetical mirroring the facts of the case referred to a gang member and a gang associate.

¹⁶ As our Supreme Court has explained: "Because section 664[, subdivision] (a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' [citation], it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' [Citation.] Moreover, the jury does not decide the truth of the penalty

Thus, although defendant technically has not forfeited this claim, the claim lacks merit.¹⁷

premeditation allegation until it first has reached a verdict on the substantive offense of attempted murder. [Citation.] Thus, with respect to the natural and probable consequences doctrine as applied to the premeditation allegation under section 664[, subdivision] (a), attempted murder—not attempted premeditated murder—qualifies as the nontarget *offense* to which the jury must find foreseeability. Accordingly, once the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated. [¶] Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation.” (*Favor, supra*, 54 Cal.4th at pp. 879-880.)

¹⁷ As defendant points out, the California Supreme Court granted review in *People v. Mateo* (Feb. 10, 2016, B258333) [nonpub. opn.], review granted May 11, 2016, S232674) to answer the question of whether *Favor* should “be reconsidered in light of *Alleyne v. United States* (2013) [570] U.S. [99] and *People v. Chiu* (2014) 59 Cal.4th 155.” Ultimately, the Supreme Court transferred *Mateo* back to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of Senate Bill No. 1437. (*Mateo, supra*, transferred Mar. 13, 2019.) The Court of Appeal thereafter issued an unpublished decision. (*People v. Mateo* (Jul. 9, 2019, B258333) [nonpub. opn.].) The court in *Chiu* cited *Favor* with approval. (*Chiu, supra*, at pp. 162-163.) *Favor* remains good law.

VII. Cumulative Error

Defendant contends that even if the above-described errors were not prejudicial when considered individually, the combined effect of the errors violated his federal constitutional right to due process. Defendant does not make an argument grounded in the facts of this case to support his claim. Assuming defendant has not forfeited this claim, he has failed to demonstrate prejudice.

We have found no abuse of discretion in the denial of the new trial motion. Two of his three prosecutorial error claims have been forfeited; the third lacks merit because the prosecutor correctly stated the law. Thus, any claim of cumulative error must be based on the instructional error which occurred in this case.

Two of defendant's claims of instructional error involve what amount to harmless typographical errors. The remaining two claims of instructional error involve statements of law which are correct in the abstract but have the potential to mislead a jury under certain circumstances. As we have explained, no such circumstances were present here. For these reasons, defendant's claim of cumulative prejudicial error fails.

VIII. Gang Enhancement Instruction

In order to meet the legal definition of a criminal street gang, an entity must have as one of its primary activities the commission of one or more criminal acts specified in section 186.22, subdivision (e). (*Id.*, subd. (f).) Felony vandalism is such an offense; misdemeanor vandalism is not. (*Id.*, subd. (e)(20).)

Defendant contends the trial court erred prejudicially in instructing the jury that "vandalism" could qualify as a primary activity of a gang for purposes of section 186.22. He maintains

the court should have instructed the jury that “felony” vandalism could qualify as such an activity. He further contends that if the gang enhancement is reversed, the section 12022.53, subdivision (e)(1)(A) firearm enhancement must be reversed as well because it applies when a person has been found to have violated section 186.22, subdivision (b). Defendant did not object to the instruction and the People contend defendant has forfeited the claim. At defendant’s request, we review his claim pursuant to section 1259.

Defendant is correct that only felony vandalism qualifies as a primary activity under section 186.22, subdivisions (f) and (e). The difference between misdemeanor and felony vandalism lies in the amount of the damage caused by the crime; if the damage is \$400 or more the vandalism is a felony. (§ 594, subd. (b)(1) & (b)(2)(A).)

Deputy Whiting, the gang expert, described the vandalism committed by the 10 Deuce Gangster Crips as “low level vandalism.” He did not use the terms felony or misdemeanor and did not provide dollar amounts for the vandalism damage. Thus, the trial court erred in instructing the jury on vandalism because there was no evidence that it was felony vandalism as required by section 186.22, subdivision (e)(20).

The court’s error was harmless under either the *Watson* or *Chapman* standards of review. There is no reasonable probability or possibility that the trial court’s error contributed to the true finding on the gang enhancement, or stated alternatively, no reasonable probability or possibility that defendant would have received a more favorable outcome in the absence of the error.

Deputy Whiting identified four other primary activities of the gang: assaults with a firearm, robberies, weapon possession and narcotics sales. These offenses are all specified in section 186.22, subdivision (e). (§ 186.22, subd. (e)(1) [assault with a deadly weapon], (e)(2) [robbery], (e)(4) [sales of controlled substances], (e)(31) [prohibited possession of a firearm].) The prosecutor produced specific evidence that one gang member had been convicted of robbery while another had been convicted of prohibited possession of a firearm. No other witnesses testified about the gang's primary activities.

There was no basis for jurors to believe Deputy Whiting's testimony about vandalism but not his testimony about the other four offenses, particularly robbery and prohibited firearm possession. (Cf. *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 880 [no reason for the jurors to believe the victim's testimony that the defendant stole handgun but not other property].) There was similarly no basis for the jury to find that the "low level vandalism" was a "chief" or "principal" occupation of the gang, but that the gang committed the other identified activities only occasionally. (See CALJIC No. 17.24.2 [instructing on frequency requirements].) Accordingly, the error was harmless under either the state or federal standard of review. Because the true finding on the gang enhancement is valid, there is no basis to reverse the section 12022.53, subdivision (e)(1)(A) firearm enhancement.

IX. Firearm and Gang Enhancements Sentences

The trial court sentenced defendant to a term of seven years to life for each premeditated attempted murder conviction, doubled to 14 years pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170, subds. (a)-(d)). The court then indicated that

the section 12022.53, subdivision (d) enhancement required a sentence of 25 years to life to be imposed consecutively to the 14-years-to-life sentence. The court then added another 10 years for the section 186.22, subdivision (b)(1)(C) gang enhancement. Thus, the court sentenced defendant to terms of 49 years to life for each attempted murder conviction, then imposed those terms consecutively to reach a total term of confinement of 147 years to life.

Defendant contends the 25-years-to-life enhancement term provided by section 12022.53, subdivision (d) could not be imposed because there was no jury finding that defendant personally used and discharged a firearm in the commission of the attempted murders. Section 12022.53, subdivision (e)(1) permits the imposition of the 25-years-to-life enhancement under section 12022.53, subdivision (d) if the jury determines both that the defendant violated section 186.22, subdivision (b) and a principal personally and intentionally discharged a firearm within the meaning of subdivision (d). The jury made both such determinations in this case. Thus, this contention lacks merit.

Defendant further contends and the People agree that the trial court erred in adding a 10-year term for the gang enhancement to the attempted murder conviction. We agree as well.

Subdivision (e)(2) of section 12022.53 provides: “An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.” When a jury finds only that a principal personally used a firearm in the commission of an

offense, the defendant is not subject to an enhancement for participation in a criminal street gang, in addition to the enhancement imposed under section 12022.53. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238 [Div. 1]; *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1424-1425 [Div. 8]; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282 [Div. 5]; see § 12022.53, subd. (j) [existence of any fact necessary for penalties under the section must be pled and either admitted by the defendant or found true by the trier of fact].)

X. Correction of the Abstract of Judgment

The People request that we order the abstract of judgment corrected to reflect the trial court's sentences of 14 years to life in prison for the premeditation attempted murder convictions. The abstract currently shows sentences of seven years to life. Defendant does not object. We will order the correction.

XI. Senate Bill No. 620 Remand

In a supplemental brief filed with our permission, defendant requests that we vacate the true findings on the section 12022.53 firearm enhancement allegations and remand the matter for the court to exercise its discretion under Senate Bill No. 620 to strike or retain those enhancements. In a supplemental reply brief, the People agree that remand is appropriate.

On January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) took effect, which amends section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. (Stats. 2017, ch. 682, § 2.) The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of

the amendment. (See *People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 742-748.) Defendant's conviction was pending on appeal in this court when Senate Bill No. 620 went into law and so was not final on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

In light of the People's agreement that remand is appropriate, we will remand this matter. On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancements providing a longer term of imprisonment, and impose and stay any enhancements providing a lesser term. (§ 12022.53, subs. (f) & (h).) For example, the court may choose to impose the 25-year-to-life enhancement under subdivision (d). If so, it should impose and stay the enhancements under subdivisions (c) and (b).¹⁸ If the court imposes the 20-year enhancement under subdivision (c), it must then strike the 25-year-to-life

¹⁸ Here, the jury found true that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b), (e)(1), (c), (e)(1), and (d), (e)(1) for counts 1, 2 and 3.

enhancement under subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) “In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant’s criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.” (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant’s criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(22) of section 667.5 provides that a violent felony is “[a]ny violation of Section 12022.53.” As a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

Lastly, as discussed in part IX, *ante*, the court may not impose both the firearm and gang enhancements. (§ 12022.53, subd. (e)(2).) However, if the court chooses to strike all of the firearm enhancements attendant to defendant’s attempted murder convictions, the court may consider whether the alternate gang penalty must be imposed. (See § 186.22, subd. (b)(5); *People v. Brookfield* (2009) 47 Cal.4th 583, 591; *People v. Jones* (2009) 47

Cal.4th 566, 576; see also *People v. Fuentes* (2016) 1 Cal.5th 218 [discussing § 1385 discretion regarding gang enhancements].)

DISPOSITION

The 10-year terms for the section 186.22 gang enhancements are ordered stricken. The trial court is instructed to correct the abstract of judgment to show a sentence of 14 years to life for each of the attempted murder convictions. The matter is remanded to permit the trial court to consider whether to exercise its discretion and strike the section 12022.53 firearm enhancements, consistent with this opinion. The judgment of conviction is affirmed in all other respects.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.